IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Scott Lipsky

Application No.: 10/675,925   Confirmation No.: 2365

Filed: September 29, 2003   Art Unit: 2444

For: METHOD AND SYSTEM FOR   Examiner: T. T. Nguyen
     DISTRIBUTING IMAGES TO CLIENT
     SYSTEMS

REPLY BRIEF UNDER 37 C.F.R. § 41.41

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Reply Brief responds to the Examiner's Answer mailed on October 7, 2010 in the above-identified application, and is in furtherance of the Notice of Appeal filed on May 5, 2010 and the Appeal Brief filed on July 2, 2010.

I.   STATUS OF CLAIMS

Claims 1-57 have been presented. Claims 6, 9-36, and 42 have been canceled. Claims 1-5, 7, 8, 37-41, and 43-57 are therefore presently pending.

Claims 1-5, 7, 8, 37-41, and 43-57 stand rejected and are the subject of the present appeal.

II.   GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A.   The Examiner's Rejections

1.   The Examiner rejected claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a) over U.S. Patent Application Publication No. 2003/0110503 by Perkes ("Perkes"), U.S. Patent Application Publication No. 2002/0056123 by Liwerant et al. ("Liwerant"), and U.S. Patent Application Publication No. 2002/0152432 by Fleming ("Fleming").

2.   The Examiner rejected claim 7 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and U.S. Patent No. 6,617,879 to Chung ("Chung").

3.   The Examiner rejected claim 50 under 35 U.S.C. § 103(a) over Perkes, Liwerant, Fleming, and U.S. Patent No. 6,845,010[1] to Christian et al. ("Christian et al.").[2]

B.   The Issues on Appeal

1.   Is the Examiner's rejection of claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Fleming proper?

2.   Is the Examiner's rejection of claim 7 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Chung proper?

3.   Is the Examiner's rejection of claim 50 under 35 U.S.C. § 103(a) over Perkes, Liwerant, Fleming, and Christian proper?

---

[1] Appellants previously listed identified Christian as U.S. Patent No. 6,843,010. (Appeal Brief, July 2, 2010, p. 6.)

[2] The Examiner also rejected claims 6 and 42 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Christian. However, these claims were canceled in the Response to Non-Final Office Action filed on October 27, 2009. Accordingly, Appellants have not addressed this rejection herein.

III.   ARGUMENTS IN REPLY TO EXAMINER'S ANSWER

   A.   The portions of Perkes identified by the Examiner do not disclose or
         suggest "if it is determined that the time associated with the most recently
         received communication from the client system is within the certain time
         period, sending the image to the client system via the communications
         link," as recited in independent claims 1 and 55.

During prosecution the Examiner asserted that Perkes at ¶¶ [0078]-[0079] discloses "if it is determined that time associated with the most recently received communication from the client system, sending the image to the client system via the communication link." (Final Office Action, Feb. 5, 2010, p. 3.) As Appellants previously noted, "[t]his is an incomplete statement of Appellants' claim feature," and "the 'determination' cited by the Examiner is no determination at all, and is merely an empty statement." (Appeal Brief, July 2, 2010, p. 11.) In contrast to assertions made during prosecution, the Examiner now asserts that the "Examiner stated that perkes [sic] discloses if it is determined that time associated with the most recently received communication form [sic] the client system is within the certain time period, sending the image to the client system via the communication link." (Examiner's Answer, Oct. 7, 2010, p. 22.) Appellants respectfully note that the Examiner's assertions in the Examiner's Answer do not correspond to the Examiner's assertions during prosecution. Nevertheless, the Examiner's reliance on Perkes at ¶¶ [0078]-[0079] as disclosing "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link" is insufficient to disclose or suggest the "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link" limitation, as recited in independent claims 1 and 55.

Perkes at ¶¶ [0078]-[0079] describes a Master Agent that determines the on line or off line status of a viewer's computer and, if the viewer's computer is online, provides the viewer with information associated with a broadcast segment. According to the

Examiner, Perkes' "off/online status" corresponds to Appellants' recited "period of time." (Examiner's Answer, Oct. 7, 2010, p. 22.) However, as Appellants' previously stated, Perkes does not disclose or suggest how the on line or off line status of a viewer's computer is determined, and in particular does not disclose a determination that is made based on "the time associated with the most recently received communication from the client system," as recited in independent claims 1 and 55. Moreover, Perkes does not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link" as recited. Perkes simply does not make any determination based on "the time associated with the most recently received communication from the client system," as recited.

Nor does Perkes inherently disclose "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link." A prior art reference only inherently discloses a claim feature if the system described in the reference *necessarily* functions in accordance with the claim feature. (*In re King*, 801 F.2d 1324, 1326 (Fed. Cir. 1986).) Perkes may reasonably determine the on line or off line status of a viewer's computer without considering a time associated with a communication from a viewer's computer at all. For example, Perkes' Master Agent may simply initiate a communication to the viewer's computer without determining whether a communication has previously been received from the viewer's computer.

      B.   The portions of Perkes identified by the Examiner do not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55.

The Examiner's Answer is inconsistent regarding the Examiner's reliance on the applied references as disclosing "if it is determined that the time associated with the most recently received communication from the client system is not within the certain

time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55. The Examiner's Answer asserts that "Perkes does not explicitly disclose 'determining that time associated with the most recently received communication from the client is not within certain time period.'" (Examiner's Answer, Oct. 7, 2010, p. 5.) The Examiner's Answer also asserts that "Examiner stated that Perkes if it is determined that that [sic] the time associated with the most recently received communication from the client system is not within the certain time period as, sending the image to the client system via a mechanism other than the communications link as shown in page.8, paragraphs 0078-0079 if online (not within time period), the viewer is provided certain information about the broadcast segment." (Examiner's Answer, Oct. 7, 2010, p. 23.) It is unclear how Perkes may describe sending a message to a client system if it is determined that the time associated with the most recently received communication from the client system is not within a certain time period if, as the Examiner points out, Perkes does not make such a determination.

Furthermore, Appellants respectfully submit that the relied-upon portion of Perkes does not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link." As discussed above, Perkes at ¶¶ [0078]-[0079] describes a Master Agent that determines the on line or off line status of a viewer's computer and provides the viewer with information associated with a broadcast segment if the viewer's computer is online. However, as Appellants' previously noted, Perkes does not disclose or suggest <u>how</u> the on line or off line status of a viewer's computer is determined. Perkes simply does not make any determination based on "<u>the time associated with the most recently received communication from the client system</u>," as recited. Nor does Perkes inherently disclose "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the

communications link," as Perkes may reasonably determine the on line or off line status of a viewer's computer without considering a time associated with a communication from the viewer's computer at all.

> C.   <u>The portions of the applied-references identified by the Examiner do not disclose or suggest "a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37.</u>

According to the Examiner's Answer, "Perkes teaches the package of images should be distributed to the client system via the communications link based on when the client system last communicated with the image distribution computing system via the communications links as shown in page.8, paragraphs 0078-0079 base [sic] on if online (not within time period), the viewer is provided certain information about the broadcast segment." (Examiner's Answer, Oct. 7, 2010, p. 23.) However, and as discussed in further detail above, Perkes at ¶¶ [0078]-[0079] describes a Master Agent that determines the on line or off line status of a viewer's computer and provides the viewer with information associated with a broadcast segment if the viewer's computer is online but does not disclose or suggest how the on line or off line status of a viewer's computer is determined. The Examiner's assertion that Perkes "teaches" that "images should be distributed to the client system via the communications link based on when the client system last communicated with the image distribution computing system via the communications link" is not correct. The relied-upon portions of Perkes provide no indication that the Master Agent determines when a client system last communication with an image distribution system in determining whether the client system is online or offline. If fact, the relied-upon portions of Perkes do not describe how Perkes' Master Agent determines how a client system is online or offline. The relied-upon portions of Perkes simply do not disclose making any determination based on "when the client system last communicated with the image distribution computing system via the

communications link," as recited.   Nor does Perkes inherently disclose such a determination.

The Examiner's Answer further asserts "perkes [sic] does not explicitly disclose sending the image to the client system via a mechanism other than the communication link (offline), the Liwerant discloses sending the image to the client system via a mechanism other than the communication link as shown in Liwerant, page.5, paragraph 0052 teaching recorded on CD-ROM and sent to the user of sender's computer 10 by postal services." (Examiner's Answer, Oct. 7, 2010, pp. 23-24.) Although Liwerant describes sending a CD-ROM to a user via the postal service, Liwerant provides no indication that the CD-ROM is sent based on "when a client system last communicated with the image distribution computing system via the communications link." Liwerant, like Perkes, does not disclose or suggest sending images to a client system via a mechanism other than the communications link based on "when a client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37.

Moreover, and as Appellants previously noted, "the Examiner's citation to Perkes as disclosing sending content via the Internet and to Liwerant as sending content on a CD-ROM via the postal service does not satisfy the Examiner's burden. In particular, the Examiner has not cited a reference or combination of references that discloses or suggests 'a component that determines . . . whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link,' as recited in independent claim 37. At most, Perkes and Liwerant each disclose sending content via a single mechanism – the Internet or the postal service, respectively. Neither of these references, whether alone or in combination, discloses or suggests determining which of multiple delivery mechanisms is to be used to send content, let alone basing such a

determination on when the client system last communicated with the image distribution computing system via the communications link." (Appeal Brief, July 2, 2010, p. 22.)

D.   The portions of Fleming identified by the Examiner do not disclose "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46.

The Examiner asserts that "perkes [sic] disclose [sic] determining whether an image is to be sent to the client system via the Internet or via some other mechanism as shown perkes page.10, paragraph 0125, if viewer offline, the intend tot he [sic] broadcast notification which mean if offline then use others than mechanism." (Examiner's Answer, Oct. 7, 2010, p. 24.) Perkes at ¶ [0125] describes a "Master Agent [that] sends Intent to Broadcast Notification[s] and verifies transmission permissions." "If the Viewer is On-Line, the Viewer is notified of the Intent to Broadcast, as output by the Master Agent. If the Viewer is Off-Line, the Intent to Broadcast Notification is stored with the Master Agent for future notification to the Viewer Agent (that is, when the Viewer Agent goes back On-Line)." (Perkes, ¶ [0125].) Thus, the Examiner's assertion that "if viewer offline . . . then use others than mechanism" is not correct. (Examiner's Answer, Oct. 7, 2010, p. 24.) Perkes does not use another mechanism of communication when the viewer is offline. Rather, Perkes simply waits until the "Viewer Agent goes back On-Line" and then provides a notification to the Viewer Agent. (Perkes, ¶ [0125].)

Furthermore, Perkes does not disclose or suggest how the on line or off line status of a viewer's computer is determined. The Examiner relies on Fleming at Figure 1 and ¶¶ [0018], [0020], [0023], [0027], and [0028] as disclosing "heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications." The cited portions of Fleming describe an administrative function performed by a distributed system to detect failure of one or more networks or processes. If a failed network or process is detected, a

corrective action (e.g., eliminating and/or replacing a failed process) can be taken. To detect a network failure, Fleming compares the difference between a period of time for process A to receive a heartbeat from process B on a first network, and a period of time for process A to receive a heartbeat from process B on a second network. If the difference exceeds a network failure threshold, the second network is suspected of failing. To detect a process failure, Fleming determines whether a heartbeat is received from any process in a system prior to expiration of a process failure time limit. For example, Fleming measures the difference between a time a last heartbeat was received from a process and a later instance in time. For any process from which a heartbeat is not received, the process is suspected of failing.

While Fleming describes receiving heartbeats from a process, Fleming provides no indication that the receipt of these heartbeats is recorded. Accordingly, Fleming does not disclose or suggest "<u>recorded indications of the receipt of heartbeat communications</u>," as recited in independent claim 46. Nor does Fleming disclose or suggest "<u>determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications</u> of the receipt of heartbeat communications," as recited. Fleming either eliminates or replaces a failed process based on the heartbeats or takes no action at all but does not "determin[e] whether an image is to be sent to the client system via the Internet or via some other mechanism," as recited.

IV.   CONCLUSION

For at least these reasons, along with the reasons presented in Appellants' Appeal Brief, each of claims 1-5, 7, 8, 37-41, and 43-57 has been improperly rejected, both (a) in that the Examiner has failed to provide cited references that disclose all of the elements of these claims, and (b) in that the applied references would not support any proper rejection of these claims. Accordingly, Appellants persist in seeking the reversal of the rejection of claims 1-5, 7, 8, 37-41, and 43-57.
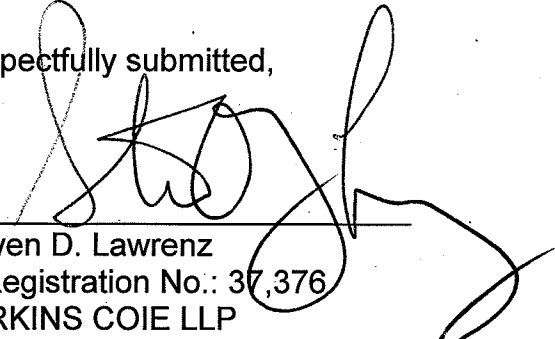
Please charge any deficiency in fees or credit any overpayment to our Deposit Account No. 50-0665, under Order No. 320529154US from which the undersigned is authorized to draw.

Dated: December 7, 2010   Respectfully submitted,

By_____

Steven D. Lawrenz
   Registration No.: 37,376
PERKINS COIE LLP
P.O. Box 1247
Seattle, Washington 98111-1247
(206) 359-8000
(206) 359-7198 (Fax)
Attorney for Applicant